Supreme Court, U.S.
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In The
Supreme Court of the United States

OSCAR STILLEY,

Petitioner,

v.

ROBERT BROWN, TOM GLAZE, DONALD L. CORBIN, ANNABELLE CLINTON IMBER, and JIM HANNAH, EACH IN THEIR INDIVIDUAL CAPACITY AND IN THEIR OFFICIAL CAPACITY AS A JUSTICE OF THE ARKANSAS SUPREME COURT; BETTY DICKEY and JIM GUNTER, EACH IN THEIR OFFICIAL CAPACITY AS A JUSTICE OF THE ARKANSAS SUPREME COURT; and RAY THORNTON AND W. H. "DUB" ARNOLD, EACH IN THEIR INDIVIDUAL CAPACITIES,

Respondents.

On Petition For A Writ Of Certiorari To The Eighth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Is a judge who functions as accuser and decider in the same case at the same time is nonetheless a "competent" court, even though the judge's order was entered in a tribunal in which the judge does not sit and does not even claim to hold office?

2) Is a judge who functions as accuser and decider in another tribunal, in direct contravention of the rules made by that judge's court acting "wholly without jurisdiction" such that judicial immunity does not apply?

3) Where a judge usurps the role of the decision maker in another tribunal, and prevents the proper officer from considering and deciding a motion for reconsideration directed to the proper officer, for a period of 687 days, despite repeated and diligent efforts to obtain a ruling, does the litigant nonetheless have "the opportunity to raise and have ***timely decided*** by a ***competent*** state tribunal the federal issues involved" as required by *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 594, 95 S.Ct. 1200, 1203, 43 L.Ed.2d 482 (1975) (quoting *Gibson v. Berryhill*, 411 U.S. 564, 577, 93 S.Ct. 1689, 1697, 36 L.Ed.2d 488 (1973))?

4) Were the Petitioner's due process rights infringed when the proper officer, the Chair of the panel of the Arkansas Supreme Court Committee on Professional Conduct, flatly refuses to explain his summary "denial" of the motion, which gave no consideration to the constitutional issues raised?

PARTIES TO THE PROCEEDING

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PETITION FOR WRIT OF CERTIORARI

Petitioner Oscar Stilley respectfully requests that a writ of certiorari be issued to review the judgment of the Eighth Circuit Court in this case.

OPINIONS BELOW

The March 23, 2004 order and judgment of the U.S. District Court for the Eastern District of Arkansas, dismissing Petitioner's federal complaint, is reproduced at App. 3. A timely motion to alter or reconsider was made, whereupon the Court entered an order denying the motion, dated April 28, 2004, reproduced at App. 8. Notice of Appeal was filed on May 13, 2004, which made the opening brief at the Eighth Circuit due on the 28th day of June, 2004. The District Court's opinion was affirmed in an unpublished per curiam decision dated January 11, 2005, reproduced at App. 1. A timely petition for rehearing and rehearing en banc was filed, which was denied at the direction of the Court on February 16, 2005, reproduced at App. 9.

STATEMENT OF JURISDICTION

Jurisdiction to appeal from the District Court to the Eighth Circuit Court of Appeals is found in 28 U.S.C. § 1291, for appeal from a final decision of the United States District Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), for a petition for writ of certiorari to the Eighth Circuit Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution Amendment 5, providing that "No person shall . . . be deprived of life, liberty, or property without due process of law . . . "

U.S. Constitution Amendment 14, providing that "Nor shall any state deprive any person of life, liberty, or property, without due process of law . . . "

STATEMENT OF THE CASE

On March 26, 2002, Petitioner filed suit, as attorney for one Robert White, against Respondents, justices of the Arkansas Supreme Court. Among the claims was an allegation that respondents were committing an illegal exaction in receiving salary greater than that allowed by Arkansas Constitution Amendment 9, according to recent case law written by Respondents. White requested recusal of the sitting justices, since recusal was clearly mandatory under precedents from both federal and state courts.

Fifteen days later, without notice or opportunity to be heard, the Respondents summarily dismissed the illegal exaction claim against themselves, on grounds that the suit could not be instituted as part of an original action at the Arkansas Supreme Court. *White v. Priest*, 348 Ark. 135, 73 S.W.3d 572 (Ark. 2002) Respondents also denied the motion for recusal. Respondents issued a show-cause order, requiring Appellant to show cause why sanctions pursuant to Arkansas Rules of Civil Procedure, Rule 11, should not be imposed.

Petitioner filed a brief of some 70 pages explaining why the claims were properly brought as an original action, asking for reconsideration, and explaining why Rule 11 of the Arkansas Rules of Civil Procedure was not violated. Respondent justices did not impose Rule 11 sanctions, but did refer Petitioner to the Arkansas Supreme Court Committee on Professional Conduct for such claimed offenses as "a general tone of disrespect for the code of ethics and Mr. Stilley's breach of his oath of office as an attorney-at-law."

The rules of the Arkansas Supreme Court Committee on Professional Conduct (hereinafter sometimes Committee) provide that such complaints by justices must be prosecuted, regardless of their merit or lack of same. Therefore, Mr. Stark Ligon, Executive Director of the Arkansas Supreme Court Committee on Professional Conduct, instituted an ethics complaint against Petitioner.

Petitioner promptly sought to depose the justices in conformity with Committee rules. Mr. Ligon duly issued the requested subpoenas, which Petitioner caused to be properly served February 14, 2003. Later the same day, the Respondents "quashed" the subpoenas, without notice or opportunity to be heard, by a letter/order/motion sent to Mr. Ligon.

Petitioner moved for reconsideration February 19, 2003, on grounds, among others, that 1) Petitioner received no notice or opportunity to be heard prior to the deprivation of the important right to depose his accusers, 2) Respondents flagrantly and willfully violated Committee rules which provide that discovery disputes will be decided by the Chair of the panel to which the matter is assigned, and 3) Respondent Arkansas Supreme Court

justices acted wholly without jurisdiction, by entering an order against their adversary in a proceeding not before the Arkansas Supreme Court.

Respondents did not acknowledge or respond to the motion for reconsideration. When this motion was not acted upon for 289 days, despite repeated assurances that a decision would be forthcoming "soon," Petitioner brought a civil action in District Court pursuant to 42 U.S.C. § 1983, and other statutes, for compensatory and injunctive relief against the Respondents.

Respondents moved for dismissal on various grounds. The District Court dismissed based on the *Younger*[1] abstention doctrine, and declined to reconsider despite a written claim by the Executive Director that the Committee is not a governmental agency at all, and despite ample proof that Petitioner could not have his claims adjudicated at the Committee, or on appeal from same, consistent with the minimum requirements of due process.

Petitioner appealed to the Eighth Circuit Court of Appeals. Some 687 days after the filing of the original motion requesting that Petitioner be heard, in writing or orally, on his arguments of why he should be permitted to proceed with the depositions, the Chair of Panel "B" of the Committee entered an order summarily and without explanation denying the request, with no consideration or analysis with respect to the constitutional issues raised.[2] Five days later, the Eighth Circuit Court of Appeals

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[1] *Younger v. Harris*, 401 U.S. 37 (1971).

[2] A subsequent request for an explanation of the reasons for the action was likewise denied.

summarily and without explanation affirmed the District Court's order in an unpublished per curiam decision.

Petitioner filed a petition for rehearing, raising the following two points:

1) Whether a judge who functions as accuser and decider in the same case at the same time is nonetheless a "competent" court.

2) Whether this Court will permit a claimed tribunal (which simultaneously claims not to be a public agency or supported by public funds)[3] to wait 687 days to rule on a motion, and then rule upon the motion in a manner suggesting the communication of assurances concerning the outcome of the 8th Circuit case, by reason of the fact that the adverse 8th Circuit panel opinion was released a mere 5 days thereafter.

The Eighth Circuit Clerk denied the petition for rehearing, by order entered February 16, 2005 at the direction of the Court, without explanation. This petition for writ of certiorari followed.

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[3] In an email explaining why he was not duty bound to release certain public records pursuant to the Arkansas Freedom of Information Act, Executive Director Ligon claimed that the Arkansas Supreme Court Committee on Professional Conduct was not an agency supported in whole or in part by public funds, or expending public funds.

REASONS FOR GRANTING THE WRIT

1. The unpublished per curiam Eighth Circuit panel opinion does not address the fact that an "incompetent" state court precludes abstention under *Younger v. Harris*, 401 U.S. 37 (1971).

The Respondent justices of the Arkansas Supreme Court clearly usurped the role of the chair of Panel "B" of the Arkansas Supreme Court Committee on Professional Conduct, for the express purpose of quashing subpoenas served upon the justices. The Committee rules, known as the "Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law" provide in Section 8 (B) that:

> Resolution of Disputes. Disputes concerning discovery shall be determined by the **chair of the panel** to which the matter was assigned. All discovery orders by the chair are interlocutory and may not be appealed prior to the entry of the final order.

(Emphasis added)

The Respondents personally quashed the subpoenas of Petitioner without notice or opportunity to be heard, despite a clear rule vesting the Chair of Panel "B" with sole authority to decide discovery matters before the Committee. None of the Respondents were the Chair of Panel "B" at the time of their issuance of an order quashing their own subpoenas, nor did Respondents ever make such a claim.

If there was a legitimate reason for the Respondents' actions, why would they engage in an act not colorably within their jurisdiction? A judicial officer can be required to testify in cases in which they have material information. In

Dennis v. Sparks, 449 U.S. 24, 30 (1980), the U.S. Supreme Court said:

> Of course, testifying takes time and energy that otherwise might be devoted to judicial duties; and, if cases such as this [Page 31] survive initial challenge and go to trial, the judge's integrity and that of the judicial process may be at stake in such cases. But judicial immunity was not designed to insulate the judiciary from all aspects of public accountability. Judges are immune from § 1983 damages actions, but they are subject to criminal prosecutions as are other citizens. *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974). **Neither are we aware of any rule generally exempting a judge from the normal obligation to respond as a witness when he has information material to a criminal or civil proceeding.**[fn7] [footnote omitted] Cf. *United States v. Nixon*, 418 U.S. 683, 705-707 (1974).

(Emphasis added)

This case represents a textbook case in favor of requiring a judicial officer to testify. The accusations are so vague as to amount to little more than criticism. Most of the "charges" are altogether without precedent. No one except the accusing Respondents can say what they meant by the accusations.

On February 19, 2003, Petitioner filed a motion for reconsideration of the decision to quash, before the Committee. Despite repeated assurances over a long period of time, that a ruling would be forthcoming soon, no ruling

was entered until January 6, 2005,[4] 687 days later. The Eighth Circuit appeal was submitted to the panel the same day, and summarily denied in an unpublished per curiam opinion on January 11, 2005, or 692 days after the filing of the Committee motion.

Why? The Arkansas Judicial Discipline & Disability Commission, on September 23, 2002, sanctioned Special Judge Stephen P. Sawyer, in Case #02-176,[5] because he took 643 days to decide a matter before him.

It very much looks like the Chair of Panel "B" waited until he had assurances from the Eighth Circuit that his actions would not be scrutinized by the assigned panel of the Eighth Circuit Court of Appeals. Why else would one wait for nearly two years, and then suddenly enter a ruling the exact same day that the Eighth Circuit case was submitted to the panel? In *Yamaha Motor Corp., U.S.A. v. Riney*, 21 F.3d 793 (8th Cir. 1994), the Court said:

> [19] A "necessary predicate for a *Younger* dismissal . . . is, 'the opportunity to raise and have ***timely decided*** by a ***competent*** state tribunal the federal issues involved.'" *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 594, 95 S.Ct. 1200, 1203, 43 L.Ed.2d 482 (1975) (quoting *Gibson v. Berryhill*, 411 U.S. 564, 577, 93 S.Ct. 1689, 1697, 36 L.Ed.2d 488 (1973)). This requirement for *Younger* abstention, articulated in both *Huffman* and *Gibson*, is a reiteration of the third Middlesex

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[4] The Eighth Circuit case was submitted January 6, 2005, precisely the same day the Chair of Panel "B" entered the summary order denying the motion before the Committee.

[5] Complete opinion at http://www.arkansas.gov/jddc/pdf/sawyer_092302.pdf.

> requirement.[fn10] [footnote omitted] Thus, *Huffman* and *Gibson* explain that a district court ***may not*** abstain from an exercise of its jurisdiction when the parties lack a competent state tribunal to decide the issues.

(Emphases added)

The ruling on the motion to reconsider before the Committee, and the unpublished Eighth Circuit panel opinion, could be rephrased to say "We read your pleadings carefully, and you lose" with virtually no loss of meaning in either instance. When Petitioner asked the Chair of the Committee Panel the reasons for his actions, he stated that he felt no obligation to explain his decision whatsoever.

Petitioner raised a number of legal issues in his motion to the Committee, including specifically the deprivation of due process as guaranteed by the state and federal constitutions. Petitioner asked for a ruling with respect to, amongst other things, A.C.A. § 21-8-304, a statute forbidding state employees from using their official position to secure special privileges for themselves or their relatives, and Arkansas Constitution Amendment 80, which provides:

> No Justice or Judge shall preside or participate in any case in which he or she might be interested in the outcome, in which any party is related to him or her by consanguinity or affinity within such degree as prescribed by law, or in which he or she may have been counsel or have presided in any inferior court.

The Chair of Panel "B" addressed none of these arguments, summarily denying the motion. Thus the Chair has already defeated the altogether illusory right to appeal to the Arkansas Supreme Court concerning the constitutional issues raised. Petitioner is already defeated pursuant to the rule of *E-Z Cash Advance, Inc., v. Harris*, 347 Ark. 132, 136, 59 S.W.3d 432 (2001) where the Court said:

> We are unable to reach the merits of Harris's argument regarding the usurious nature of the contract, because she failed to obtain a ruling from the trial court on this argument. Her failure to obtain such a ruling is a procedural bar to our consideration of this issue on appeal. See *Barker v. Clark*, 343 Ark. 8, 33 S.W.3d 476 (2000).

Firm but respectful demands for a ruling have been fruitless. There is no other method of obtaining the prerequisite ruling, thus Petitioner's constitutional claims will be heard through the intervention of this august tribunal or not at all.

In *Middlesex Ethics Comm. v. Garden State Bar Assn.*, 457 U.S. 423, 437 (1982) the Court said:

> Because respondent Hinds had an "opportunity to raise and have timely decided by a competent state tribunal the federal issues involved," *Gibson v. Berryhill*, 411 U.S., at 577, and because no ***bad faith, harassment, or other exceptional circumstances*** dictate to the contrary, federal courts should abstain from interfering with the ongoing proceedings. Accordingly, the judgment of the United States Court of Appeals for the Third Circuit is reversed, and the case is

> remanded for further proceedings consistent with this opinion.

(Emphases added)

If the Arkansas Supreme Court's activities do not fall under the category of "bad faith, harassment, or other exceptional circumstances," then Petitioner would like to hear what it takes to constitute such. In *Middlesex Ethics Comm. v. Garden State Bar Assn*, the Court said:

> Respondent Hinds contends that there was no opportunity in the state disciplinary proceedings to raise his federal constitutional challenge to the disciplinary rules. Yet Hinds ***failed to respond to the complaint*** filed by the local Ethics Committee and ***failed even to attempt to raise any federal constitutional challenge in the state proceedings***. Under New Jersey's procedure, its Ethics Committees constantly are called upon to interpret the state disciplinary rules. Respondent Hinds points to nothing existing at the time the complaint was brought by the local Committee to indicate that the members of the Ethics Committee, the majority of whom are lawyers, would have refused to consider a claim that the rules which they were enforcing violated federal constitutional guarantees. Abstention is based upon the theory that "'[t]he accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection.'" *Younger v. Harris*, 401 U.S., at 45, quoting *Fenner v. Boykin*, 271 U.S. 240, 244 (1926).

(Emphases added)

Despite Hinds' lackadaisical approach to his dilemma, the New Jersey Supreme Court actually considered Hinds' constitutional claims sua sponte. The *Middlesex* Court continued on to say:

> Whatever doubt, if any, that may have existed about respondent Hinds' ability to have constitutional challenges heard in the bar disciplinary hearings was laid to rest by the subsequent actions of the New Jersey Supreme Court. Prior to the filing of the petition for certiorari in this Court the New Jersey Supreme Court sua sponte entertained the constitutional issues raised by respondent Hinds. Respondent Hinds therefore has had abundant opportunity to present his constitutional challenges in the state disciplinary proceedings.
>
> There is no reason for the federal courts to ignore this subsequent development. . . .

If there was not reason to ignore subsequent developments then, surely the same principle would be true today. The subsequent developments in the instant case have been extreme delay in the consideration of a motion concerning due process and other constitutional rights, and then total refusal to make a reasoned opinion on those questions – even when Petitioner made a second request in a firm but respectful manner.

The Arkansas Supreme Court has for all practical purposes put itself out of the running for a sua sponte offer to consider constitutional claims. After they have entered an order in the Committee records, despite their own rules

prohibiting same, an unlawful act almost[6] unprecedented in American jurisprudence, what credibility do they have left? Their conduct for the duration of this litigation has been one continuous train of abuses and usurpations, and denials of due process.

It is hard to imagine a case more unlike that of *Middlesex Ethics Comm. v. Garden State Bar Assn.*

In fact, out of the District Court opinion, the Eighth Circuit opinion, the petition for rehearing, and the ruling from the Chair of the panel, not one even makes a stab at analyzing whether or not petitioner's federal issues would be either "timely decided" or decided by a "competent" tribunal! Only the District Court wrote a meaningful opinion of any sort, and his opinion walks straight up to the central issue and refuses to address it. Had the District Court addressed the question, the dismissal could not have been entered.

If the Chair of Panel "B" had believed that the denial of Petitioner's unrebutted motion was lawful, he would have entered it promptly, not 687 days after it was filed. Such an order can be typed without substantial guidance by any competent legal secretary. The directive to type such an order can be given orally or in writing in 30 seconds or less. Such an order requires no thought or reasoning, and gives no guidance to members of the bar.

On petition for rehearing, Petitioner asked the Eighth Circuit panel to explain the suspicious timing, stating that he had no desire to erroneously accuse the Eighth Circuit panel and the Chair of the Committee with collaborating if

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[6] Perhaps entirely unprecedented.

it were not true.[7] Both the Eighth Circuit panel and the Chair of Panel "B" refuse to explain themselves.

Petitioner has had considerable difficulty ascertaining or "framing the issue" concerning the identity and nature of the "tribunal" to which the District Court thought it should defer. The actual supposed "tribunal" is Panel "B" of the Arkansas Supreme Court Committee on Professional Conduct. However, in fact the Respondent Arkansas Supreme Court Justices slip in and out of the role of the Chair of Panel "B" as easily as one might change hats.

Where as here, justices act as de facto "chairs" of the Committee panels, who or what is the tribunal? Is Petitioner in fact before the Arkansas Supreme Court under the name of the Committee? Is the Petitioner before the Committee, but with the proviso that the Respondents get the first and last word, if they feel like it?

The Eighth Circuit, relying on authority from the U.S. Supreme Court, has explicitly stated that a biased tribunal, or even a single member of a tribunal who is biased and refuses to recuse, deprives a litigant of an "adequate" opportunity to litigate his issues in state court. In *Yamaha Motor Corp., U.S.A. v. Riney*, 21 F.3d 793 (8th Cir. 1994) the Eighth Circuit said:

> [20] We hold that the district court's finding that there was no evidence of bias in the state proceeding is clearly erroneous. The district court

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[7] Where the Arkansas Supreme Court justices declare their pleasure immediately, it may be that the Chair of the panel would be intimidated to tell the justices that their action is wrong. But if that were the case, why the long delay prior to a bland pronouncement upholding the justices' clearly unlawful action?

> erred when it dismissed this action pursuant to Younger abstention because the state proceeding was before an incompetent tribunal. Adjudication by an incompetent state tribunal ***precludes*** a federal court from abstaining on *Younger* grounds.[fn11] [footnote omitted] *Gibson*, 411 U.S. at 577, 93 S.Ct. at 1697. **"Nor . . . would a different result be required simply because judicial review, de novo or otherwise, would be forthcoming at the conclusion of the administrative proceedings." Id.**

(Emphases added)

A judge who is at once the accuser, the decider, and litigant in separate litigation cannot possibly constitute a "competent" tribunal under *Yamaha*. When one adds in the fact that the court's own rules plainly eliminate all possibility that said judge might be an authorized judicial officer for the question at hand, any claim of competency is frivolous.

The *Yamaha* Court's standard for proof of bias is as follows:

> [22] An adjudicator is presumed to be unbiased; to overcome that presumption, a litigant must make a "showing of conflict of interest or some other specific reason for disqualification." *Schweiker v. McClure*, 456 U.S. 188, 195, 102 S.Ct. 1665, 1670, 72 L.Ed.2d 1 (1982). An indirect financial interest in the claim raises a question of impartiality. *Nissan Motor Corp. v. Royal Nissan, Inc.*, 757 F. Supp. 736, 740 (E.D.La. 1991). Bias can be shown by a finding that the adjudicator prejudged the issues or had a pecuniary interest in the subject of the action. *Gibson*, 411 U.S. at 578, 93 S.Ct. at 1697. In general, the test

> is whether the adjudicator's situation is one "which might lead him not to hold the balance [between the parties] nice, clear and true." *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749 (1927); accord *Ward v. Village of Monroeville*, 409 U.S. 57, 60, 93 S.Ct. 80, 83, 34 L.Ed.2d 267 (1972).

Both the Arkansas and United States Supreme Courts have declared that due process is a fundamental right of all citizens. The Arkansas Court of Appeals, in *Southwestern Bell Tel. v. Arkansas Pub. Serv. Comm'n*, 58 Ark. App. 145, 946 S.W.2d 730 (1997), stated that the right of due process includes:

> [11, 12] A full and fair hearing is a fundamental requirement of due process in the determination of the reasonableness of utility rates, and ***in order to meet due process requirements, a hearing must afford a utility the right to reasonably know the charges and the right to meet such charges by competent evidence.*** *Arkansas Pub. Serv. Comm'n v. Continental Tel. Co. of Ark.*, 262 Ark. 821, 561 S.W.2d 645 (1978). ***The opportunity to submit evidence to rebut charges or adverse claims and testimony is an essential requirement of a full and fair hearing of the due process clause of the Constitution.*** Id. Here, the evidence supports the Commission's finding that the Petitioners were advised of the issues before the Commission and were given the opportunity to present evidence to the Commission in support of all the components of the proposed tariffs, including the existing rate-of-return factor.

(Emphases added)

Petitioner was neither advised of the issues before his deposition subpoenas were quashed, nor informed that there was any plan or possibility that the subpoenas might be quashed. Respondents did not so much as pay lip service to the requirements of due process. No judicial officer could do what they have done in good conscience or with the slightest pretension that he or she was acting within the confines of the law.

Petitioner has been totally denied the opportunity to obtain evidence whereby he might submit evidence to rebut the pending charges of unethical conduct. He has not been permitted to obtain a shred of evidence in support of his position. Presumably, any attempt to subpoena witnesses with relevant evidence to a hearing of the ethics charges will likewise be denied.

This case involves an accusation by the members of the Arkansas Supreme Court against Petitioner. *In re Murchison*, 349 U.S. 133 (1955) is perhaps the foremost case explaining the rules regarding judges who make accusations and then attempt to be the decisionmaker in the trial of the charges levied. In that case, the Court said:

> **A fair trial in a fair tribunal is a basic requirement of due process.** Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. **To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.** That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that "every procedure which would offer a possible temptation to the average man as a judge . . . not

to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." *Tumey v. Ohio*, 273 U.S. 510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954).

. . .

This incident also shows that the judge was doubtless more familiar with the facts and circumstances in which the charges were rooted than was any other witness. **There were no public witnesses upon whom petitioners could call to give disinterested testimony concerning what took place in the secret chambers of the judge.** If there had been they might have been able to refute the judge's statement about White's insolence. Moreover, as shown by the judge's statement here, a "judge-grand jury" might himself many times be a ***very material*** witness in a later trial for contempt. ***If the charge should be heard before that judge, the result would be either that the defendant must be deprived of examining or cross-examining him or else there would be the spectacle of the trial judge presenting testimony upon which he must finally pass in determining the guilt or innocence of the defendant.***[fn10] In either event the State would have the benefit of the judge's personal knowledge while the accused would be denied an effective opportunity to cross-examine. The right of a defendant to examine and cross-examine

> witnesses is too essential to a fair trial to have that right jeopardized in such way.
>
> We hold that it was a violation of due process for the "judge-grand jury" to try these petitioners, and it was therefore error for the Supreme Court of Michigan to uphold the convictions. The judgments are reversed and the causes are remanded for proceedings not inconsistent with this opinion.

(Emphases added)

2. The unpublished per curiam Eighth Circuit opinion falls below the minimum standards required of judicial proceedings; the honor and public esteem of this August tribunal require that the Court exercise its supervisory role, and require the Eighth Circuit to re-examine its decision.

U.S. Supreme Court Rule 10 provides for "Considerations Governing Review on Certiorari." The Court may treat this petition as falling under Rule 10(c), since there is ample basis for stating that the Eighth Circuit panel opinion contradicts any number of U.S. Supreme Court decisions. This petition also falls under the last part of Rule 10(a), which provides that a reason considered by the Court for the grant of certiorari is that a U.S. court of appeals " . . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power."

In this case, the Respondents have engaged in clear, flagrant misconduct and denial of due process. They have left Petitioner with no meaningful alternative except to

seek relief before the U.S. Supreme Court. This conduct is clearly contrary to the precedent of the Arkansas Supreme Court. See for example *Sexton v. Ark. Supreme Ct. Comm. On Profess. Conduct*, 299 Ark. 439 (1989), where the Arkansas Supreme Court said:

> The appellant insists that the Committee should fulfill its functions by gathering information, investigating complaints, and making recommendations to this court. He argues that the Committee has gone beyond those functions and become a court in its own right through the exercise of the power of this court in suspending the appellant's license.
>
> In establishing this Committee, we have presumed the honesty and integrity of those appointed. Certainly we could never tolerate the denial of the right to practice law without fully affording due process to the practicing attorney. Amendment 28 did not specify the procedure or the manner in which we would regulate the practice of law. We have adopted rules and have declared that the right to appeal a decision of the Committee exists. See *Sexton v. Supreme Court Committee on Professional Conduct*, 297 Ark. 154-A, 761 S.W.2d 602 (1988).

Despite these reassurances to the bar, the Respondents have flagrantly violated their own rules, denying due process so clearly that a contrary argument cannot be made with any credibility whatsoever. In the face of this conduct, the potential of an appeal to the Respondents has virtually no value.

Furthermore, the Respondents have all but promised that they would not recuse from Petitioner's future cases,

when required by precedent to recuse. In *White v. Priest*, 348 Ark. 135, 73 S.W.3d 572 (Ark. 2002) the Court said:

> Even if this court had original jurisdiction to initially consider a claim based on illegal exactions, the justices still would be empowered and duty bound to consider and decide these issues White strives to raise. Under Ark. Code of Judicial Conduct Canon 3(E)(1), while a judge must disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, the "Rule of Necessity" may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute. See Commentary to Canon 3(E)(1);[8] see also Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges* § 20.2.2, at 591-592 (1996) (the Rule of Necessity is most likely to be invoked in situations where the filing of a suit whose resolution will directly affect the pecuniary well-being of judges as a whole, such as a suit seeking to increase judicial pay or retirement benefits); and Jeffery M. Shaman et al., Judicial Conduct and Ethics § 4.03, at 111-112 (3d ed. 2000).

This claim has no merit. This case is totally different from *United States v. Will*, 449 U.S. 200 (1980), where there was no readily available method of obtaining disinterested jurists. On the contrary, questions concerning judicial salaries, or laws affecting same, and the justices have always recused and allowed the governor to appoint special justices. See for example *Brickhouse v. Hill*, 167

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[8] This commentary was written – at least in part – by the Respondents!

Ark. 513, 268 S.W. 865 (1925), another case in which the judicial pay of Arkansas judicial officers was in question, in which all justices recused.

In the *White* case, tens of thousands of dollars of their own salary was at stake, yet they did not recuse, not did they comply with the most elementary requirements of due process. Respondents dismissed the *White* complaint without any notice or opportunity to be heard prior to decision.[9]

In light of this history, it would be foolish to indulge the normal presumption, that judges with a clear disqualification will recuse, where there is a well established procedure for the appointment of replacement judges. Petitioner has shown not only a great need for this Court to exercise it's supervisory powers, for the good of the legal profession, but also a situation where the probability of Petitioner obtaining the most rudimentary due process is exceedingly low.

This Court unquestionably is required to deal with a large volume of requests for certiorari. This particular request need not consume a great deal of the time of the Court. Supreme Court Rule 16(1) permits this Court to summarily dispose of cases on the merits. This case does not call for scholarly analysis, since none of the decisions below have even tried to put words on paper to justify the actions of Respondents. They have simply refused to

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[9] While Respondents dismissed the complaint before the time for any of the other Defendants' answer had run, Respondents did give their co-defendants 4 days time to respond to Petitioners show cause brief, if they so chose.

consider and adjudicate the important constitutional questions raised.

If the Respondents think that any fact or legal conclusion herein is erroneous, they have the right to file a brief pursuant to Supreme Court Rule 15. Absent such a filing, or in the event that the filing does not squarely meet and deny the allegations of the petition, it is plain that the Petitioner has shown himself entitled to the issuance of the writ.

The Court has in hundreds of cases summarily vacated judgments and remanded the case to a court of appeals, with respect to the *United States v. Booker*, 543 U.S. _____, 160 L. Ed. 2d 621, 125 S. Ct. 738 (2005) issue alone. For example, see *West v. United States*, 2005 U.S. LEXIS 3295 (U.S., 2005), where the Court said:

> OPINION: On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Motion of petitioner for leave to proceed in forma pauperis and petition for a writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *United States v. Booker*, 543 U.S. ___, 160 L. Ed. 2d 621, 125 S. Ct. 738 (2005).

Judicial economy is a wonderful principle which should be respected in this case. Unless the Respondents make a substantial challenge to the facts set forth herein, this Court is fully empowered to simply issue the following order:

> OPINION: On petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit. Petition for a writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light

> of *In re Murchison*, 349 U.S. 133 (1955), *Southwestern Bell Tel. v. Arkansas Pub. Serv. Comm'n*, 58 Ark. App. 145, 946 S.W.2d 730 (1997), *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749 (1927), and *Yamaha Motor Corp., U.S.A. v. Riney*, 21 F.3d 793 (8th Cir. 1994).

Otherwise, the Respondents would likely assume the Court's action to amount to a stamp of approval on the specific misconduct in this case, and similar acts of misconduct. In *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 306 (1998), this Court stated:

> Turning to respondents' arguments to this Court, as an initial matter, we reject the State's suggestion that this Court's summary dismissals in several other cases should be dispositive of the question presented in this case. See Brief for Respondent Commissioner of Taxation and Finance [Page 307] 15-16, n. 8.[fn3] Although we have noted that "[o]ur summary dismissals are . . . to be taken as rulings on the merits in the sense that they rejected the specific challenges presented . . . and left undisturbed the judgment appealed from," we have also explained that they do not "have the same precedential value . . . as does an opinion of this Court after briefing and oral argument on the merits." *Washington v. Confederated Bands and Tribes of Yakima Nation*, 439 U.S. 463, 477, n. 20 (1979) (citations and internal quotation marks omitted).

Petitioner has taken care to state the challenges in this case with specificity. Other challenges could also be made, but Petitioner has stated challenges to conduct so clearly illegal as to be a gross embarrassment to the bench and bar. After all, what judge could think that he has jurisdiction when the rules created by that judge's own

court unequivocally state otherwise? And what judge could think that he or she has a legal right to usurp authority over a matter before another tribunal, merely because that judge was the accuser of the responding attorney in that case? The fact that the judge is the accuser is all the more reason that the accusing judge must allow the controversy to be decided by the legally constituted authority.

Petitioner submits that the facts demonstrate a clear case for the Court to exercise its supervisory power. The honor and reputation of this august tribunal, and of courts below, depend upon the imposition of consistent and certain discipline where there has been an abandonment of the judicial role. That is what has happened in this case.

CONCLUSION

Petitioner faces an accusation by the Respondents, who are also his judges, when they so elect, even as to matters not before Respondents' court. Respondents have usurped the role of the Chair of the Committee, despite unmistakable language stating that discovery disputes must be decided by the Chair of the Committee, and not a judge who is at once the accuser and adversary. Petitioner has been forced to defend against allegations so vague that no definite meaning can be ascertained. This cannot constitute a "competent" tribunal, under U.S. Supreme Court case law, or Eighth Circuit case law, else the entire concept of a "competent" tribunal ceases to have any meaning whatsoever.

Furthermore, by all appearances, the Chair of the Committee waited for word that he might deny the Petitioner's motion for reconsideration of the quashing of

his subpoenas without embarrassing repercussions, then summarily denied the motion without explanation and without ruling on any of the constitutional questions involved. The timing of these events, including the denial of the motion 687 days after filing, the day of submission of the Eighth Circuit appeal, and 5 days before the Eighth Circuit panel opinion, suggest that communication between one or more members of the Eighth Circuit panel and the Chair of the Committee has further deprived Petitioner of his rights to a constitutional and competent tribunal. Neither the Respondents nor the Eighth Circuit has even claimed that such communication did not take place, despite the suggestion of same in a proper pleading, with request for correction if the perception was inaccurate.

The honor, integrity, and public reputation of this Court require that the unpublished per curiam panel decision of the Eighth Circuit be vacated. The cause should be remanded for a decision consistent with *Yamaha Motor Corp., U.S.A. v. Riney*, 21 F.3d 793 (8th Cir. 1994), and the numerous U.S. Supreme Court cases requiring that legal disputes be decided by a disinterested tribunal.

Respectfully submitted,

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APPENDIX 1

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 04-2172

Oscar Stilley, Appellant, v. Betty Dickey, in her official capacity as Chief Justice of the Arkansas Supreme Court (for the "official" capacity claims against former Chief Justice W. H. "Dub" Arnold); Robert Brown, in his individual capacity and in his official capacity as a Justice of the Arkansas Supreme Court; Tom Glaze, in his individual capacity and in his official capacity as a Justice of the Arkansas Supreme Court; W. H. Arnold, in his individual capacity; originally sued as W. H. "Dub" Arnold; Donald L. Corbin, in his individual capacity and in his official capacity as a Justice of the Arkansas Supreme Court; Annabelle Clinton Imber, in her individual capacity and in her official capacity as a Justice of the Arkansas Supreme Court; Jim Hannah, in his individual capacity and in his official capacity as a Justice of the Arkansas Supreme Court, Appellees.	*	Appeal from the United States District Court for the Eastern District of Arkansas. [UNPUBLISHED]

Submitted: January 6, 2005
Filed: January 11, 2005

Before MURPHY, FAGG, and SMITH, Circuit Judges.

PER CURIAM.

Oscar Stilley appeals the district court's[1] dismissal under *Younger v. Harris,* 401 U.S. 37 (1971), of his 42 U.S.C. §§ 1983, 1985, and 1988 complaint against defendant justices of the Arkansas Supreme Court. He also appeals the denial of his motion for reconsideration. Having carefully reviewed the record, we conclude that the district court did not abuse its discretion in determining that abstention was appropriate, and in denying the motion for reconsideration. Accordingly, the judgment of the district court is affirmed. *See* 8th Cir. R. 47B.

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[1] The Honorable James M. Moody, United States District Judge for the Eastern District of Arkansas.

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
LITTLE ROCK DIVISION

OSCAR STILLEY — PLAINTIFF

VS. CASE NO. 4:03CV000965 JMM

RAY THORNTON, IN HIS INDIVIDUAL CAPACITY AND IN HIS OFFICIAL CAPACITY AS A JUSTICE OF ARKANSAS SUPREME COURT, ET AL. — DEFENDANTS

ORDER

(Filed Mar. 23, 2004)

Pending before the Court is defendants' motion to dismiss to which plaintiff has responded. For the reasons stated below, the motion will be granted.

Plaintiff, an attorney, brings his complaint against all seven members of the Arkansas Supreme Court ("defendants") for alleged violations of his due process and equal protection rights under the United States Constitution pursuant to 42 U.S.C. §§ 1983, 1985 and 1988. Plaintiff has sued defendants in their "individual" and "official" capacities seeking declaratory and injunctive relief, compensatory and punitive damages, costs, and attorney's fees.

Plaintiff filed an original action in the Arkansas Supreme Court against defendants on behalf of his client, Robert White. Defendants struck the complaint and entered an order against plaintiff directing him to show cause why sanctions should not be entered against him.

Plaintiff responded to the show cause order with a 70 page brief contending sanctions were unwarranted. Defendants subsequently referred plaintiff to the Arkansas Supreme Court Committee on Professional Conduct ("Committee") based upon "a general tone of disrespect for the code of ethics and . . . breach of his oath of office as an attorney-at-law."

As a result of this referral, plaintiff served each of the defendants with a subpoena for appearance at depositions for "among other reasons the purpose of ascertaining the nature and cause of their accusation, and specific rules or legal provisions thought to have been violated by plaintiff." Based upon these subpoenas, defendants sent a letter to Stark Ligon, Executive Director of the Office of Professional Conduct, requesting and directing that the subpoenas be quashed citing Arkansas Code Annotated § 25-19-105(b)(8) which states that documents that are protected from disclosure by order or rule of court are not open to the public. (Ex. 1 to the Complaint).

On February 19. 2003, plaintiff responded to the defendants' letter by filing a Response to Motion to Quash Subpoenas of Supreme Court Justices, and Motion to Strike Order Purporting to Grant Motion to Quash alleging that defendants did not have jurisdiction to direct that the subpoenas be quashed. The Office of Professional Conduct has taken no action on this response and plaintiff alleges that defendants have directly or indirectly acted to prevent the Office of Professional Conduct from taking any further action on his response.

The Court will dismiss a complaint upon a motion to dismiss only when "'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim

which would entitle him to relief.'" *Casazza v. Kiser,* 313 F.3d 414, 418 (8th Cir.2002) (*quoting Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L.Ed.2d 80 (1957)). Moreover, the Court must accept the allegations in the complaint as true and construe them in the light most favorable to the plaintiff. *Kottschade v. City of Rochester,* 319 F.3d 1038, 1040 (8th Cir.2003).

Plaintiff agrees that judges are absolutely immune from suits for actions taken in their judicial capacity. *See Mireles v. Waco,* 502 U.S. 9, 11-12, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991) (*per curium*) (judicial immunity is immunity from suit, not just from ultimate assessment of damages).[1] He contends, however, that defendants were not acting in their judicial capacity which would entitle him to prospective injunctive relief.

The Supreme Court has held that, when judges act in an enforcement capacity against attorneys, they are subject to prospective injunctive relief. *See Supreme Court of Virginia v. Consumers Union of the United States,* 446 U.S. 719, 739, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980) (plaintiffs entitled to declaratory and injunctive relief without regard to defendants' status as judicial officers because lawsuit arose out of their role as "enforcers" of the bar rules).

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[1] In 1996 in response to *Pulliam v. Allen*, 466 U.S. 522, 541-42, 104 S.Ct. 1970, 80 L.Ed.2d 565 (1984) (judicial immunity does not bar prospective injunctive relief), Congress enacted the Federal Courts Improvement Act of 1996 which amended 42 U.S.C. § 1983 to provide that "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. Pub.L. No. 1044-317, 110 Stat. 3847 (1996).

The *Younger* abstention doctrine prohibits a federal court from interfering in pending state civil cases where (1) there is an ongoing state proceeding, (2) that implicates important state interests, and (3) there is an adequate opportunity in the state proceeding to raise the federal issues. *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432, 102 S.Ct. 2515, 73 L.Ed.2d. Here, there is an on going state proceeding implicating the state's interest in overseeing a code of ethics for attorneys licensed to practice in state of Arkansas, and there is a procedure in place which plaintiff can pursue his claim against defendants.

Defendants' motion to dismiss is granted (#12). Judgment will be entered accordingly. IT IS SO ORDERED this 23 day of March, 2004.

/s/ James M. Moody
James M. Moody
United States District Judge

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
LITTLE ROCK DIVISION

OSCAR STILLEY — PLAINTIFF

VS. CASE NO. 4:03CV000965 JMM

RAY THORNTON, IN HIS INDIVIDUAL CAPACITY AND IN HIS OFFICIAL CAPACITY AS A JUSTICE OF ARKANSAS SUPREME COURT, ET AL. — DEFENDANTS

JUDGMENT

(Filed Mar. 23, 2004)

Pursuant to the Order entered on this day, it is Considered, Ordered and Adjudged that this case be, and it is hereby, dismissed.

IT IS SO ORDERED this 23 day of March, 2004.

/s/ James M. Moody
James M. Moody
United States District Court

APPENDIX 4

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
LITTLE ROCK DIVISION

OSCAR STILLEY PLAINTIFF

VS. CASE NO. 4:03CV000965 JMM

RAY THORNTON, IN HIS INDIVIDUAL CAPACITY AND IN HIS OFFICIAL CAPACITY AS A JUSTICE OF ARKANSAS SUPREME COURT, ET AL. DEFENDANTS

ORDER

(Filed Apr. 28, 2004)

For the reasons previously stated plaintiff's motion to alter or reconsider the Court's March 23, 2004 Order is denied (#23). The Judgment entered on March 23, 2004 is a final appealable order.

IT IS SO ORDERED this 28 day of April, 2004.

/s/ James M. Moody
James M. Moody
United States District Court

APPENDIX 5

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 04-2172

Oscar Stilley, Appellant,	*	
vs.	*	Order Denying Petition for Rehearing and for Rehearing En Banc
Betty Dickey, etc., et al., Appellees.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

February 16, 2005

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit